

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

FEB 17 2010

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

AMANDA Z.,	)	2 CA-JV 2009-0114
	)	DEPARTMENT A
Appellant,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 28, Rules of Civil
ARIZONA DEPARTMENT OF ECONOMIC	)	Appellate Procedure
SECURITY, CHAINING S., and CHASE S.,	)	
	)	
Appellees.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. JD2008-00144

Honorable Joseph R. Georgini, Judge

AFFIRMED

Hamilton Law Office  
By Lynn T. Hamilton

Mesa  
Attorney for Appellant

Terry Goddard, Arizona Attorney General  
By Dawn R. Williams

Tucson  
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Department of Economic Security

K E L L Y, Judge.

¶1 In this appeal, Amanda Z., mother of twins Chaining S. and Chase S., challenges the juvenile court’s order terminating her parental rights on the grounds of chronic substance abuse and length of time in care, pursuant to A.R.S. § 8-533(B)(3) and (B)(8)(b). She contends reunification services should not have been discontinued without prior court approval and the trial court erred in finding the Arizona Department of Economic Security (ADES) had made reasonable efforts to reunify the family in the six-month period under § 8-533(B)(8)(b) and in basing its decision on “conduct and events prior to the time of severance.” We affirm for the reasons stated below.

### **Facts and Procedural Background**

¶2 The children were born in Pennsylvania in April 2007. Amanda and the children moved to Arizona in June 2007 and began living with Eva M., the maternal grandmother, and Eva’s husband Jack. In September 2008, Amanda and the children moved into the house next door. Eva and Jack filed a private dependency petition on November 3, 2008, alleging the children were with the grandparents at least “50% of the time . . . at least 3-4 nights a week.” They alleged further that Amanda was addicted to methamphetamine and was unable to parent the children. In November 2008, at an initial dependency hearing, ADES was substituted in as the petitioner; it filed an amended petition in December. Also at that hearing, Amanda “submit[ted] to the issue of dependency.” Noting it had been presented with a written agreement, the court found that Amanda had knowingly, voluntarily and intelligently submitted the matter to the court and that ADES had made “reasonable efforts . . . to prevent or eliminate the need for removal of the children from the home . . . [and] to reunite the children with the

family” and adjudicated the children dependent as to Amanda. On November 1, Amanda was indicted for having possessed drugs and drug paraphernalia, and about three months later, in February 2009, she was arrested for possession of drug paraphernalia, fraud and forgery, but apparently remained out of custody.

¶3 The initial case-plan goal was reunification of the family. But after a permanency planning hearing on May 13, 2009, the court changed the plan to severance and adoption and directed ADES to file a motion to terminate Amanda’s parental rights. ADES subsequently filed its motion, alleging as grounds § 8-533(B)(2)<sup>1</sup>(neglect); (B)(3) (chronic substance abuse); and (B)(8)(b) (length of time in care). In July 2009, she was incarcerated after being arrested for burglary. Ultimately she pled guilty to various offenses and was sentenced to prison.

¶4 The juvenile court granted ADES’s motion after three days of hearings in August and October, terminating Amanda’s parental rights on the latter two grounds. The court found, inter alia, that Amanda was “unable to discharge her parental responsibilities because of a history of chronic” substance abuse and that “there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period.” The court further found that Amanda had been “provided with substance abuse assessment and treatment for her methamphetamine abuse” but that she had not participated in substance abuse classes, continued to use the drug, and “continu[ed] to participate in behavior that facilitated drug usage[,] including criminal activity resulting in her being in jail.” Additionally, with respect to § 8-533(B)(8)(b), the

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<sup>1</sup>ADES later withdrew the neglect allegation.

court found the children were under the age of three, had been out of the home pursuant to a court order “for a cumulative total period of six months or longer,” and Amanda had “substantially neglected or willfully refused to remedy the circumstances that cause[d] the children to be in an out-of-home placement including, but not limited to, the refusal to participate in reunification services offered by” ADES. Finally, the court found the children were bonded with Eva and Jack, who wished to adopt them, and termination of Amanda’s parental rights was in the children’s best interests. This appeal followed.<sup>2</sup>

### Discussion

¶5 Before the juvenile court may terminate parental rights, it must find by clear and convincing evidence that at least one of the statutory grounds for terminating the parent’s rights exists and by a preponderance of the evidence that severing the parent’s rights is in the child’s best interests. *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶¶ 1, 41, 110 P.3d 1013, 1014, 1022 (2005). On appeal, we view the evidence and all reasonable inferences in the light most favorable to upholding the juvenile court’s order. *See Manuel M. v. Ariz. Dep’t of Econ. Sec.*, 218 Ariz. 205, ¶ 2, 181 P.3d 1126, 1128 (App. 2008). We do not reweigh the evidence presented to the juvenile court because, as the trier of fact, that court “is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts.” *Ariz. Dep’t of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004). Consequently, we will affirm the order if reasonable evidence supports the factual

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<sup>2</sup>The father’s parental rights were also terminated. His separate appeal is pending. *See Ejerzaeth F. v. Ariz. Dep’t of Econ. Sec.*, No. 2 CA-JV 2009-0115.

findings upon which it is based. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). But we review questions of law de novo. *See Bobby G. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 506, ¶ 1, 200 P.3d 1003, 1005 (App. 2008).

¶6 Amanda first contends that, although she participated in services offered by ADES as they “were made available,” ADES stopped providing services once she was incarcerated. She contends there exists “a statutory and Constitutional mandate to make services for family reunification available to a parent,” citing A.R.S. § 8-846(B)(1)(b).<sup>3</sup> Amanda maintains ADES can only be relieved of that obligation when the court has expressly found, pursuant to Rule 57, Ariz. R. P. Juv. Ct., such services would be futile, or when the “[c]ircumstances support an implicit finding of futility.” Amanda argues ADES never requested such an order here, and the court never expressly found it would be futile to continue to provide her with reunification services. She contends, too, there was insufficient evidence to support the implicit finding that the services would be futile. Additionally, she asserts “no expert in substance abuse or a psychologist could testify Amanda’s drug issues were of a prolonged, indeterminate amount.”

¶7 The record establishes ADES provided Amanda a panoply of services designed to reunify her with her children, particularly services that focused on the primary impediment to reunification—her persistent use of and apparent addiction to methamphetamine. Monitoring her drug abuse was crucial; therefore, the case plan required her to submit to regular testing to determine whether she continued to use

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<sup>3</sup>Although Amanda asserts there is a constitutional mandate to provide reunification services, she does not adequately develop that argument and, thus, has waived it. *See Ariz. R. Civ. App. P. 13(a)(6)*.

methamphetamine or other drugs. A variety of services were provided through Horizon Human Services (HHS), including substance abuse testing. During the first few months of the dependency, Amanda missed four urinalysis tests, and she admitted at the severance hearing that she understood a skipped or inconclusive test would be regarded as positive. She was subsequently tested through oral swab and several of those tests were positive for methamphetamine. Case manager Kim Cook testified that, between March and July 2009, when Amanda was arrested and incarcerated, not one of her tests for methamphetamine had been negative. Ultimately, Amanda was sentenced to prison for various convictions.

¶8 Other services were provided through HHS and Arizona Families First (AFF), including substance abuse treatment, parenting classes, and supervised visitation. Amanda's lack of compliance was pervasive. She missed appointments, refused to submit to drug testing on numerous occasions, continued to test positive for methamphetamine, and engaged in the criminal conduct that resulted in her incarceration. After Amanda's arrest and incarceration in July 2009, she could not receive the same services. The caseworker testified she had written to Amanda, informing her that the same services could not be provided. The caseworker asked Amanda to contact her to discuss what services would be available while she was incarcerated. But Amanda never responded. She was nevertheless able to complete a six-week counseling course while in jail.

¶9 Thus, the record belies Amanda's assertion that ADES stopped providing her with services or that it did so without an express or implied finding that such services

would be futile. Rather, the record supports the juvenile court's finding that ADES had made diligent efforts to provide Amanda with appropriate reunification services. It attempted to provide services even after she was incarcerated, although its ability to do so was greatly hampered by her lack of compliance, her failure to maintain regular contact with the caseworker and, most significantly, her incarceration. Indeed, at the end of the first day of the severance hearing in August 2009, the juvenile court stated: "The Court will continue to find the Department[ is] making reasonable efforts in this case."

¶10 At the end of the third and last day of the hearing, the juvenile court made extensive findings of fact on the record, including the finding that "further attempts to reunify" Amanda with the children "would be futile," particularly given the short period of time provided in § 8-533(B)(8)(b). There was ample evidence to support the court's findings of fact. Among those findings that related to the futility of continued services at that point, the court found Amanda had been provided with substance abuse assessment and treatment from November 2008 until she was arrested and incarcerated in July 2009. Nevertheless, the court noted, she continued to use methamphetamine and continued "to participate in behavior that facilitated her drug usage including thefts, including criminal activity. That's undeniable." The court added, she did not participate in substance abuse classes, presumably referring to the period during which she was incarcerated, and "her brief period of sobriety is due to her incarceration."

¶11 Amanda also contends the court erred in determining ADES had made reasonable efforts to reunify the family, given the shortened, six-month time period in § 8-533(B)(8)(b) for children who are under the age of three years. Amanda implies

ADES did not begin to provide her with services quickly enough, did not monitor her closely enough, and did not “shepherd[] this case from beginning to end to assure quality control.” An abundance of evidence, however, supports the court’s finding that ADES’s efforts had been diligent and reasonable.

¶12 Contrary to Amanda’s assertion, ADES began to provide and arrange services shortly after the dependency petition was filed in November 2008. Amanda testified on the first day of the severance hearing that she had received services in November and the record shows drug testing began that month. The case worker arranged for random drug testing, supervised visitation through AmeriPsych, parenting classes, and a referral to AFF.

¶13 Although it appears Amanda did not participate in HHS intake until the end of January and that core substance abuse services and parenting instruction did not begin until February, concentrated services were provided at least from that time until she was incarcerated in July. But even assuming, *arguendo*, there was some delay in commencing services, and assuming, too, that the delay was unreasonable, it could not have made a difference here, given Amanda’s lack of compliance, the concentrated services that were provided, and her failure to benefit from them.

¶14 Additionally, there is no support for Amanda’s argument that ADES has a greater duty when severance is sought under the shortened time frame in § 8-533(B)(8)(b). In any event, as the court repeatedly found in the dependency and again on the first day of the severance hearing and at the end of the hearing, ADES diligently provided services that were reasonably designed to reunify the family. Overall, the



evidence established Amanda missed appointments, missed or arrived late for visitation, and was generally non-compliant with the services provided.

¶15 In addition to the evidence summarized above, Amanda admitted she would not be able to parent the children upon her release from prison and did not know how long it would take for her to participate in services and regain custody. The caseworker did not believe she would be able parent the children given her history of substance abuse. And by engaging in criminal conduct, she made reunification with the children essentially impossible; she was separated from her children during that time, could not provide them with housing, could not support them, and could not engage in regular visitation. She also failed to contact her caseworker to discuss alternate services after she was incarcerated.

¶16 Finally, we summarily reject Amanda's suggestion that the court erred when it considered her conduct before the motion to terminate was filed. The plain language of the statute makes it clear that a parent's conduct that precedes the filing of the motion is precisely what provides the basis for the motion. Indeed, Rule 60, Ariz. R. P. Juv. Ct., which governs permanency hearings, requires the court to evaluate the evidence that exists at that time to determine whether a motion to terminate the parent's rights should be filed. Although a parent's conduct after the motion is filed is relevant to the court's ultimate determination of whether severance is warranted we find absurd Amanda's suggestion that the juvenile court could only consider her conduct after the motion was filed to determine whether grounds for severance existed at the end of the

severance hearing. We note, moreover, that the evidence supports the court's finding that Amanda's period of sobriety began with her incarceration.

**Disposition**

¶17 The juvenile court's order is supported by reasonable evidence. We therefore affirm.

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VIRGINIA C. KELLY, Judge

CONCURRING:

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JOSEPH W. HOWARD, Chief Judge

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PHILIP G. ESPINOSA, Presiding Judge